

(23,759)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 202.

THE SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 6, 1914.



1

I. Petition and Exhibits.

Filed August 18, 1903.

United States Court of Claims, Washington, D. C.

No. 23701.

THE SOUTHERN PACIFIC COMPANY, Claimant,
vs.
THE UNITED STATES OF AMERICA, Respondent.

Petition.

To the Honorable the United States Court of Claims:

The petition of the Southern Pacific Company, a corporation,
etc., humbly showing—

I.

That your petitioner is, and at the time hereinafter mentioned was, a corporation duly created and existing by virtue of certain statutes of the State of Kentucky, viz: Chapter 403 of the Acts of the General Assembly of said State for 1884, approved March 17, 1884, and Chapter 601 of 1888, approved March 21, 1888, and under said Acts and with full authority so to do, petitioner was and is an Acting Corporation engaged in the operating of the lines of railroad hereinafter named, as a common carrier, in the States and Territories named, especially a line of railroad from the City of
2 San Francisco to Ogden, Utah, via the Town of Roseville Junction, California, formerly owned by the Central Pacific Railroad Company, but since July, 1899, owned by the Central Pacific Railway Company and a line of railroad from said Roseville Junction to Portland, Oregon. From Roseville Junction to the state line between California and Oregon, the line was formerly owned by the Central Pacific Railroad Company, but is and has been since July, 1899, owned by the Central Pacific Railway Company; from said State line to Portland, Oregon, the line is owned by the Oregon and California Railroad Company, but the entire line from San Francisco to Portland was and is operated by petitioner as lessee from the owners.

II.

By the Act of Congress of July 1, 1862, and amendatory Acts, under which the Central Pacific Railroad was constructed and its lines from Ogden to San Francisco operated, it was provided that the United States Government should at all times have the use of said road at fair and reasonable rates of compensation not to exceed the amount paid by private parties for the same kind of service.

By Section 5 of the Act of Congress, approved July 25, 1866, under which Act the line of road from Roseville Junction to Portland was constructed and has been and is operated, it was provided, among other things, that the property or troops of the United States should be transported over the railroads thereby authorized to be constructed, at the cost, charge and expense of the corporation or companies owning or operating the same when so required by the Government of the United States.

Under these provisions of law, the services below referred to have been performed by petitioner for the United States.

III.

3 In addition to the obligations named in paragraph 11 petitioner has at said times operated said lines of railroad, in connection with other lines also, under its control, and has established rates of fares and freights from all points on its lines to all other points thereon both "through" rates and "local" rates. In many cases, especially from and to seaboard and other competitive points, the "through" rates so established are much lower than the aggregate of the local rates over such line.

That all the rates of charges, both through and local, are and were fair and reasonable, and were duly published to the public, and as to the service named below were the same to the Government as those charged to individuals for like service.

IV.

That petitioner has, from time to time during the period from August 1, 1897, to March 2, 1902, and at the times set forth in the schedule attached to this petition and made part of it, on proper requisition of the proper Departmental officers of the Government of the United States, transported for the United States large numbers of persons and large quantities of goods over the said line of railroad via Roseville Junction from points on either side of Roseville Junction to points on the other.

V.

Upon performance of such services petitioner has duly presented its claims for the legal compensation to which it was entitled therefor, with the proper and necessary vouchers to the several officers of the United States whose duty it was to transmit the same to the Treasury Department of the United States for further action and payment.

VI.

4 That while petitioner was justly and lawfully entitled to the several amounts claimed as compensation for the transportation services so performed by it, as shown by said schedule, the said officers of the United States and the Department of the Treasury erroneously and unlawfully, as hereinafter stated, de-

ducted therefrom certain amounts, as shown and have duly authorized the payment of and paid to petitioner the smaller sums so determined by them to be due petitioner as hereafter stated.

That none of the said deductions were consented to by petitioner, but it protested against such deductions, and received the smaller amounts under such objection and protest.

VII.

As stated, petitioner has upon proper requisition of proper officials of the Government of the United States, within the dates named, transported large numbers of persons and quantities of goods from stations on lines of railroad operated by it, other than the line from Roseville Junction to Portland, to said Portland, and from stations on said last named line, to stations upon other lines of railroad operated by it, between which points of commencement and destination of the transportation so performed, there were at the time, through rates of fare and freight, charged to private persons, fixed in accordance with law, and which rates were lower, in proportion to distance between said points than the sum of the local rates upon said lines of railroad.

All the items of service shown on said schedule are for transportation by way of Roseville Junction.

No compensation has been claimed by petitioner for service of transportation upon said line between Roseville Junction and Portland, but upon all other lines operated as aforesaid by petitioner, and over which lines part of the transportation so furnished was performed, petitioner claimed and still claims, that the United States was chargeable with compensation at fair and reasonable rates, not exceeding those charged to private persons for like service,

5 viz: the local rate from the point of shipment to Roseville Junction, or from Roseville Junction to the point of destination, as the direction of carriage might be,—and free transportation over the whole or part of the Roseville-Portland line.

That the said officers of the Government of the United States insisted that, although no charge could properly be made for services north of Roseville Junction, the Government was entitled to reduce the charges between Roseville Junction and the point of shipment or destination to a figure based upon the actual mileage between said points, based upon the lower "through" rates.

That is to say, petitioner claimed the proper charge to be free transportation on the Roseville-Portland line, and the local rate over its outside line.

The Government claims that the rate must be a mileage rate between the points of transportation, based on the "through" rate, and payment of such rate only on the outside line, and no charge for the Roseville-Portland portion.

To make this fully understood, as this is the point of the controversy, petitioner avers that Portland has sea and river communication with San Francisco, and rates of transportation between the cities are controlled by water competition, and are very much lower than a reasonable all rail route would be.

Roseville Junction is an interior Town. Rates to and from San Francisco, and all other inland points are made upon a basis of reasonable all rail rates, so that the rate per ton per mile is less from San Francisco to Portland, than from San Francisco to Roseville Junction.

From San Francisco to Roseville Junction is about 108 miles; Roseville Junction to Portland is about 771 miles.

In shipment from San Francisco to Portland, petitioner charges the local rate for the 108 miles only.

The Government officials claim that the charge should be (in mileage stated) 108/879 of the through rate, which, as
6 stated, is largely less than the local rate to Roseville Junction, and has made the deductions shown on schedule herein on that principle.

Because the items are so numerous, and, if separately stated with circumstances as to each, would make this petition so voluminous as to be unwieldy, petitioner affixes the schedule named, to be regarded as part hereof, all in tabular form.

In 1st column are dates of services rendered.

In 2nd column, the Bureau or Department to which they were furnished.

In 3rd and 4th columns, the points between which the transportation was performed.

In 5th column, character of service.

In 6th and 7th columns, date and No. of claimant's bills.

In 8th, 9th and 10th columns, the totals of said bills, upon petitioner's basis.

In 11th to 15th inclusive, the allowance by Government Officials.

In 16th, 17th and 18th columns, the deductions made—the 18th showing total deduction.

In 19th to 21st, inclusive, the data of Treasury Warrants for allowed amount.

In 22nd column, dates of Comptroller's certificates.

All the deductions shown in said schedule were arrived at by the officers of the United States upon the basis as stated.

The total deductions so made are \$25,632.06, of which \$3,712.95 should be credited on account of the debt of the Central Pacific Railroad Company and the remainder \$21,919.11 should be paid in cash to petitioner which it is entitled to recover herein as it believes.

Petitioner says it is the sole owner of the claims so set forth, and that no assignment or transfer of the same has been made; that it is justly entitled to the full amount as claimed, after allowing all just credits and set offs; that it has not, nor have any of its stockholders, in any way voluntarily aided, abetted or given encouragement to rebellion against the Government and that it believes
7-17 the facts as stated in this petition to be true.

Wherefore it prays for judgment against the United States of America for the sum of Twenty-one-thousand nine hundred and nineteen 11/100 dollars (\$21,919.11) and the further sum of Three thousand seven hundred and twelve 95/100 dollars (\$3,712.95) to be applied as by said schedule, in all the sum of Twenty-five thousand six hundred and thirty-two 06/100 dollars, (\$25,632.06), as

shown thereby, and for such other and further relief as to the Court shall seem proper and justice shall demand.

[CORPORATE SEAL.] SOUTHERN PACIFIC COMPANY,
By JOSEPH HELLEN,
Assistant Secretary.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Joseph Hellen, being duly sworn deposes and says that he is the Assistant Secretary of said Southern Pacific Company; that he has read the above petition, and knows its contents, and that the facts therein stated are true to the best of his knowledge and belief; that he executed this petition by authority of said Company, and the seal annexed is its corporate seal.

JOSEPH HELLEN.

Subscribed and sworn to before me this 14th day of August, A. D. 1903.

WALTER H. SMITH,
Notary Public for New York County.

* * * * *

18 II. *Traverse.*

Filed February 18, 1913.

In the Court of Claims of the United States, December Term, A. D. 1912.

No. 23701.

THE SOUTHERN PACIFIC Co.

VS.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

19 III. *Argument and Submission of Case.*

On the 18th day of February, 1913, this case came on to be heard. Mr. A. A. Hoebling, Jr., was heard for the claimant; Mr. Thurlow M. Gordon was heard for the defendants and the case was submitted.

IV. *Findings of Fact and Conclusion of Law.*

Filed March 24, 1913.

SOUTHERN PACIFIC COMPANY

V.

THE UNITED STATES.

This case having been heard by the Court of Claims the court, on the evidence, makes the following

Findings of Fact.

I.

The claimant, the Southern Pacific Company, is a corporation, duly created, organized, and existing under and by virtue of the laws of the State of Kentucky, and was such corporation at the several times of performing all the services embraced in this suit; and now is, and doing all the times hereinafter mentioned was, engaged as a common carrier, of both passengers and freight, in operating, as lessee, the line of railroad from San Francisco, California, to Ogden, Utah, via Roseville Junction, California; that part of the line from San Francisco to Sacramento being owned by the Southern Pacific Railroad Company, of California, and the remaining part of said line from Sacramento to Ogden having been formerly owned by the Central Pacific Railroad Company, but since July, 1899, owned by the Central Pacific Railway Company; and also operating, as lessee, the line of railroad from said Roseville Junction to the State line between California and Oregon, said line having been formerly owned by said Central Pacific Railroad Company, under consolidation between that company and the California and Oregon Railroad Company, but since July, 1899, owned by said Central Pacific Railway Company; and, in connection with said last-named line, from said California-Oregon State line to Portland, Oregon, the latter line being likewise operated by claimant as lessee of the Oregon and California Railroad Company, owner (R., 63, 64, 69).

II.

By section six (6) of act of Congress approved July 1, 1862 (12 Stats., 489), and amendatory acts, under which said Central Pacific Railroad was constructed, and the line of road from San Francisco to Ogden operated, it was provided that the United States should, at all times have the use of said road, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

By section five (5) of act of Congress approved July 25, 1866, under which the line of road from Roseville Junction to Portland was constructed, and has been and is operated, it was

provided that the property and troops of the United States should be transported free of charge to the United States, and at the cost, charge, and expense of the corporation owning or operating said line of road from Roseville Junction to Portland, when so thereunto required by the Government of the United States (14 Stats., 239).

Under the above provisions of law, the services for which claim is made herein were performed and rendered by claimant to and for the United States.

III.

Claimant during all the times embraced in this suit (August, 1897, to March, 1902) operated as lessee, as aforesaid, said several lines of railroad from, to, and between the points herein-above named; and it duly and lawfully established, published, and promulgated rates of fare for persons and rates of freight for property, both "local" and "through," from all points on its said lines to all other points thereon.

IV.

The distance from San Francisco to Roseville is 108.03 miles (R., 32, 63; and during all the times embraced herein the lawfully established "local" first-class freight rate between said points was 26 cents per hundred pounds; which rate was low, the same being compelled by water competition—commonly called a compelled rate.

The distance from Roseville Junction to Portland is 663.91 miles (being 293.58 miles from Roseville Junction to California-Oregon State line, and 367.33 miles from said State line to Portland); and the lawfully established "through" first-class freight rate from San Francisco to Portland, during all the times aforesaid, was 51 cents per hundred pounds; which rate was also low, the same being compelled by water competition. The above rates are reasonable.

The distance from San Francisco to Portland is 771.94 miles.

V.

The established "through" rates between the points aforesaid, as well as from and to seaboard and other competitive points, were less than the aggregate of the established "local" rates; and all said rates, both "through" and "local," were the same to the United States as to individuals for like service.

VI.

The claimant, between August, 1897, and March, 1902, and at and upon the several and respective dates set forth in the schedule attached to the petition herein, on due requisition by the proper officers of defendant, transported for the United States persons and property, as therein stated, over said lines of railroad, via Roseville Junction, from points on either side thereof to points on the other

side; thus, from San Francisco, Ogden, and other points, as indicated in said schedule, to Portland via Roseville Junction.

22 The shipments in question did not originate at Roseville Junction nor terminate at Roseville Junction, but were carried through on one continuous transit over both the free haul and the nonfree haul portions of the road precisely as any through shipment is carried for a private shipper.

VII.

Upon performance of such several and respective services, claimant presented to the proper accounting officers of defendant, for allowance and payment, its several bills for such services, based upon the "local" rate to Roseville Junction and free haul beyond that point north to Portland; said several bills aggregating the sum of \$56,259.20 and being the amount claimed by it as compensation for the services so rendered.

VIII.

Defendant, however, would and did not allow and pay claimant for said services upon the basis contended for by it, as aforesaid; but would and did only allow claimant compensation based on a mileage proportion of the "through" rate, San Francisco to Portland, and payment of such mileage proportion between Roseville Junction and points south, with no allowance (being free haul) for the Roseville Junction-Portland mileage; in other words, the mileage proportion of the amount which the Government would be obliged to pay for the entire service if not entitled to the free service, thus resulting in payments by defendant to claimant for the services so rendered, as herein aforesaid, aggregating \$30,627.26, and deductions aggregating \$25,632.06, made by defendant from the bills so presented by claimant, said deductions representing the differences in amount between said two methods of computing the compensation for the services rendered; with the exception of \$1,652.06 of said deductions, which latter were based, either in whole or part, upon reasons other than the mere matter of method of computing the charge, as above, and, therefore, said last-named amount is deducted (and conceded by claimant for the purposes of this suit only) from the aggregate deductions set forth and found herein (Finding XIII post).

IX.

Under the measure of compensation contended for by claimant herein, it would be entitled to receive said "local" rate of 26 cents per hundred pounds for the transportation of freight for defendant between San Francisco and Roseville Junction.

Under the measure of compensation insisted upon and applied by defendant between the points named, claimant would only be entitled to receive (in round numbers) 108/772ds of said lower (com-

pelled) "through" rate of 51 cents per hundred pounds, San Francisco to Portland, or (in round numbers) 7.14 cents per hundred pounds for the haul from San Francisco to Roseville Junction, instead of said "local" rate of 26 cents per hundred pounds between said points.

23

X.

The same method of computing the compensation of claimant was likewise applied and used by defendant in respect of adjusting its accounts for passenger transportation, via Roseville Junction, covering the items set forth in detail in the schedules attached to the petition herein, namely, a mileage prorate of the entire "through" fare; thus for the transportation of a passenger for defendant, San Francisco to Portland, the "local" fare to Roseville Junction was \$3.05, the remainder of the transportation being "free-haul;" but defendant only allowed and paid claimant therefor the mileage prorate of the "through" fare of \$20, namely, \$2.80.

XI.

Claimant has not, in any manner or way, assented to or acquiesced in the certain reduced compensation aforesaid; but, on the contrary, has at all times objected to settlement of these accounts on the basis used by the Government in that behalf and has repeatedly protested against the same to defendant, but without avail, and the several amounts set forth herein and claimed by claimant have not been paid by defendant, nor any part thereof.

XII.

Claimant is the sole owner of the claims sued on herein and has made no transfer or assignment thereof.

XIII.

The aggregate amount of deduction made by defendant, in respect of the services so rendered by claimant, by reason of the allowance and payment of a mileage proportion of the "through" rate, instead of allowance and payment of the "local" rate to or from Roseville Junction and points on the south, is the full sum of \$23,980 (eliminating from the amounts claimed in the schedule attached to the petition certain items of deduction based in whole or in part upon reasons other than the mere basis of computing compensation to and from Roseville Junction, as above, the same amounting to the sum of \$1,652.06 made up as follows: War Department settlements, \$742.67; Interior Department settlements, \$899.39; and Agricultural Department settlement, \$10).

XIV.

The mileage basis of division has been adopted from the beginning by the highest administrative officials of the Government, and consistently adhered to. The mileage basis of division is one of the methods adopted by all railroads in the case of transportation partly over nonland grant and partly over 50 per cent land-grant lines. Where the connecting lines are owned by separate corporations, the division of through rates is a subject of negotiations between them. They are usually divided upon an agreed commercial per cent on mileage pro rata basis, in accord with relative cost of transportation.

24

XV.

The practice of issuing two bills of lading, one over the free haul and one over the nonfree-haul portion of the line, was adopted merely for convenience in accounting and had nothing to do with the "through" character of the haul. A continuous unbroken transit, without even the form of retaking possession by the Government at Roseville Junction, was contemplated by both parties, and in fact existed.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition be and the same is hereby dismissed.

V. *Opinion.*

BOOTH, J., delivered the opinion of the court.

The Southern Pacific Company operates as lessee a railroad line from San Francisco, Cal., via Roseville Junction, Cal., to Portland, Oreg., the complete distance between the termini being 771.49 miles. From San Francisco, Cal., to Roseville Junction it is 108.03 miles, leaving 663.46 miles between Roseville Junction and Portland, Oreg. The road from Roseville Junction to Portland is what is known as a free-haul road, having been originally constructed under the act of July 25, 1866 (14 Stat. L., 239), whereby in consideration of Government aid Government property and troops were to be transported free of charge. The line from Roseville to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed under the act of July 1, 1862 (12 Stat. L., 489), by the Central Pacific Company under Government aid, specifically agreeing that the Government should have the use of said road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service."

From August, 1897, to March, 1902, the defendants frequently caused the transportation of both merchandise and troops over said line, paying therefor the published tariff for local transportation

and the through tariff rates for through transportation. The adjustment of the proper amount due for through transportation provokes this controversy, on all through shipments consigned to Portland from San Francisco, or vice versa. The proper accounting officers of the Government have paid the claimant company for the haul from Roseville to San Francisco upon a proportionate mileage basis; i. e., the through rate from Portland to San Francisco is 51 cents per hundred pounds, which amount divided by 108/772, relative differences in mileage, gives, in round numbers, 7.14 cents per hundred pounds. The claimant company contends that it is entitled to the published local rate of 26 cents per hundred pounds from Roseville to San Francisco, which it asserts is just and reasonable and paid by all other shippers. There is but the one issue in the case and that is the proper rate to be applied on through shipments from Roseville Junction to San Francisco. Claimant company concedes that the through rate of 51 cents per hundred pounds would be applicable in this case if the shipment concerned private parties

25 alone; the alleged distinction as against the defendants is predicated upon the difference in the statutory provisions affecting the Government's rights as to free transportation on one line of road and pay transportation on the other. If the case involved diverse ownership of connecting lines the record fully establishes the fact that a through rate would be established and published by mutual negotiations dependent for its proper division upon the relative cost of the transportation over each line, taking into consideration the general contour of the territory traversed and other details of expense. If physical conditions are similar and the cost of transportation approximately equal over each line the rate is divided upon what is commonly called a mileage prorata basis, the exact method employed by the Government in this case. Of course the identity of ownership in this case precluded the above arrangements, and it is readily discernible that the case is exceedingly important because applicable to similar cases involving large amounts and almost daily accountings.

In the case of the Atchison, Topeka & Santa Fe R. R. Co. v. United States (15 C. Cls., 126) the court held that "through service is to be computed at through rates, local at local rates." The act of July 25, 1866 (*supra*), under which the line from Roseville Junction to San Francisco was constructed, by its express terms put the defendants as respects rate for transportation of property upon exactly the same basis as a private shipper. Their rights were no more and no less; while the transportation service from Portland to Roseville was commonly designated "a free haul" it was not so in fact; it was not gratuitous. As well said in defendants' brief, "it had been paid in advance," for the large grant of public lands was at least considered a full and complete consideration for the privilege. To say that because the defendants were compelled to pay freight on the short haul from Roseville to San Francisco converted the shipment from through transportation to local is to overlook the fact that the defendants were not exempt from payment of freight for a through shipment. It had been previously paid over one line

of railroad and they therefore became under the law entitled to all the rights of a private shipper transporting property over the entire route. The only question possibly involved is the proper division of the through rate. It is difficult to perceive how the local rate from Roseville Junction to San Francisco is at all applicable, for it must be conceded that if a private shipment only was involved no more than 51 cents per hundred pounds would have been exacted.

The method adopted by the accounting officers in the settlement of this case has been uniform and long continued. The railroads with very few exceptions have acquiesced in its justness and accepted payments in accordance therewith.

The Comptroller of the Treasury in a very exhaustive opinion covering the entire subject, found in 8 Comp. Dec., p. 598, held adversely to claimant's contention. The opinion cites and analyses the *the* various decisions upon the subject and so completely covers the entire controversy that we cite it with our entire approval.

The petition is dismissed. It is so ordered.

26

VI. *Judgment Dismissing Petition.*

No. 23701.

SOUTHERN PACIFIC COMPANY

VS.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 24th day of March, 1913, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Southern Pacific Company, be, and the same is hereby dismissed.

BY THE COURT.

27

VII. *Application for, and Allowance of, Appeal.*

Comes now the above named Southern Pacific Company, by its attorney, and prays the Court to allow an appeal to the Supreme Court of the United States, from the certain judgment entered herein March 24, 1913, dismissing the petition of claimant.

CHARLES H. BATES,

Attorney of Record for Claimant.

A. A. HOEHLING, JR.,

Of Counsel.

Filed June 10, 1913.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

June 16, 1913.

28

In the Court of Claims.

No. 23701.

SOUTHERN PACIFIC COMPANY

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 19 day of June, 1913.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

29

Supreme Court of the United States, October Term, 1913.

No. 608.

SOUTHERN PACIFIC COMPANY, Appellant,

versus

THE UNITED STATES.

Assignment of Errors.

The Southern Pacific Company, appellant, hereby specifies the following errors of the Court below upon which it intends to rely herein:

1. In holding that a mileage proportion of a "through" rate, between given terminal points, is the proper basis of compensation to appellant company, for transportation and carriage by it of passengers and freight for the United States, where a part of the trip, between said points, was over a "pay" line, and the remainder thereof was over a "free-haul" line.

2. In not holding that the proper basis of compensation in such case is the "local" rate over the "pay" line, and nothing over the "free-haul" line.

3. In holding that appellant is not entitled to recover upon the basis of the "local" rate for the services rendered by it to the United States covering so much of the haul as was over the "pay" line.

4. In failing to enter judgment for appellant in the sum of \$23,980, being the difference between compensation computed on the basis of the "local" rate on the "pay" line, and the amount actually paid appellant, computed on the basis of a mileage proportion of the through rate covering the entire distance.

5. In dismissing the petition of appellant, and in entering judgment in favor of appellee.

Appellant hereby designates the following parts of the record to be printed, and those to be omitted from the printing:

30 Print all of the transcript of the record as filed herein, with the exception of the Schedule, contained on pages 8 to 17, (both inclusive,) of said transcript; and which Schedule sets forth figures and amounts in detail, the aggregate amount whereof is correctly found by the Court below; thus entirely superseding the necessity for reference to or consideration of the individual items set forth in said Schedule.

MAXWELL EVARTS,
Attorney for Appellant.

Washington, D. C., June 24, 1913.

WASHINGTON, D. C., July 18, 1913.

Receipt of copy of the foregoing is hereby acknowledged.

J. C. McREYNOLDS,
Attorney General of the United States.
H.

31 [Endorsed:] 608/23759. No. 608. Oct. Term, 1913. Supreme Court of the United States. Southern Pacific Company, Appellant, versus The United States. Specification of Errors and designation of portions of record to be printed, &c., and acknowledgment of service of copy. The Clerk will please file. Maxwell Evarts, Att'y for Appellant.

32 [Endorsed:] File No. 23,759. Supreme Court U. S., October term, 1913. Term No. 608. Southern Pacific Company, Appellant, vs. The United States. Specification of errors to be relied upon and designation by counsel for appellant of parts of record to be printed, and proof of service of same. Filed July 21, 1913.

Endorsed on cover: File No. 23,759. Court of Claims. Term No. 202. The Southern Pacific Company, appellant, vs. The United States. Filed June 20th, 1913. File No. 23,759.

Office Supreme Court, U. S.

FILED

DEC 18 1914

JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 202.

SOUTHERN PACIFIC COMPANY, APPELLANT,

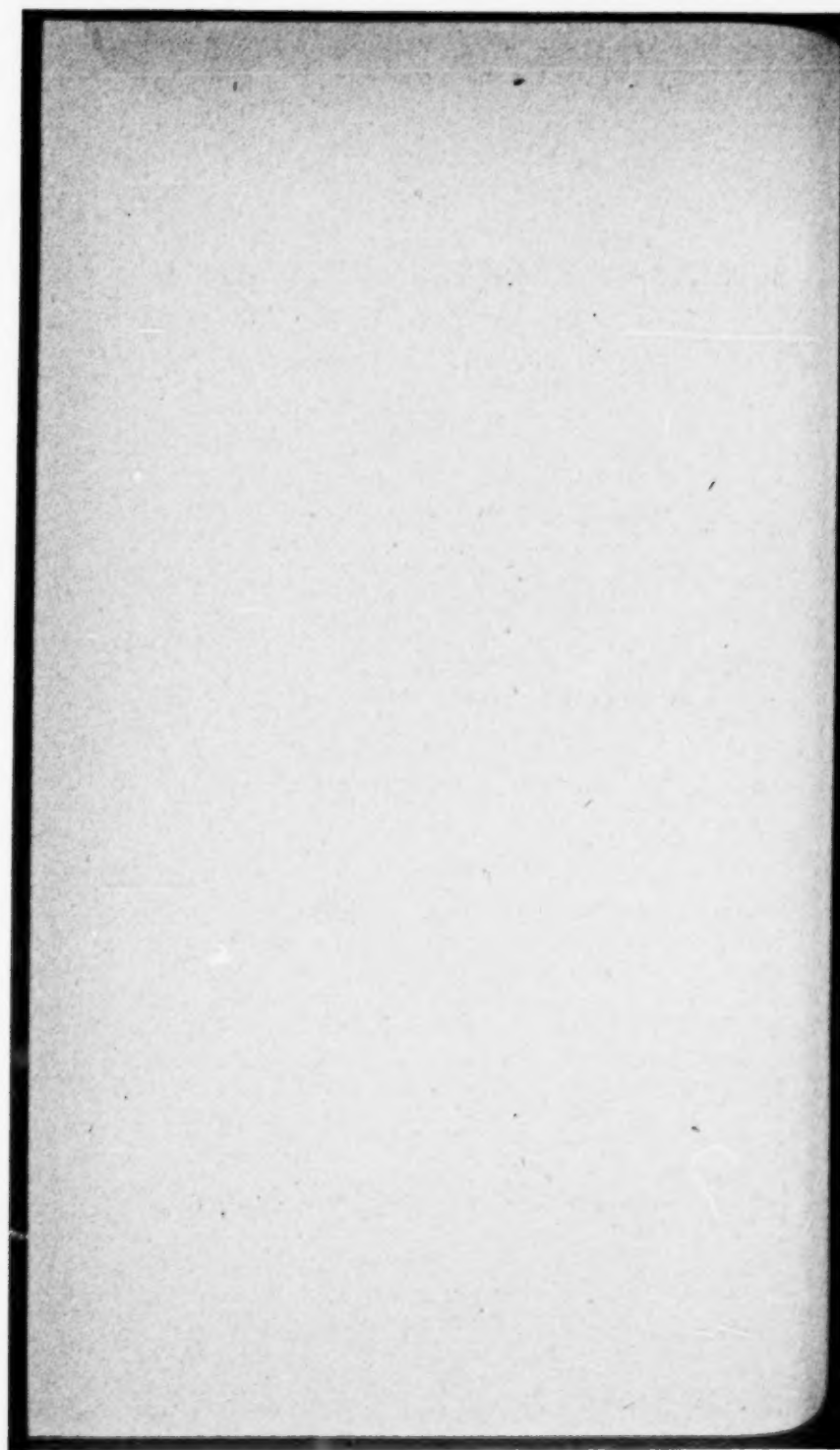
vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

A. A. HOEHLING, JR.,
Attorney for Appellant.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 202.

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement.

The Southern Pacific Company operates, as lessee, a railroad line from San Francisco, California, *via* Roseville Junction, California, to Portland, Oregon, the distance between said termini being 771.94 miles. The distance from San Francisco to Roseville Junction is 108.03 miles, and the distance from Roseville Junction to Portland is 663.91 miles. The road from Roseville Junction to Portland is what is known as "free-haul," having been originally constructed under the act of Congress, approved July 25, 1866 (14 Stat., 239), by the terms whereof Government property and troops were to be transported free of charge. The line from Rose-

ville Junction to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed by the Central Pacific Railroad Company under the act of Congress, approved July 1, 1862 (12 Stat., 489), by the terms of which it was specifically provided that the Government should have the use of said road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" (R., 6, 7).

From August 18, 1897, to March, 1902, the United States caused the transportation of both Government property and troops over said line, and from the several accounts presented by the railroad company for such service the accounting officers of the United States deducted amounts aggregating the sum of \$23,980; the latter having applied a mileage proportion of the published tariff *through* rate, notwithstanding the fact that one part of the haul was over a "free-haul" line, and the other over a nonfree-haul or "pay" line (R., 8, 9).

Appellant contended that it was entitled to the full local rate on the pay line, and, of course, nothing on the free-haul line; the United States contending, on the other hand, that it was entitled to nothing over the free-haul line (and that is conceded), but, on the nonfree-haul line, or pay line, is entitled only to a *mileage proportion* of the *through* rate, covering both portions, free-haul and pay line (R., 8).

That is the only issue in the case; there are no disputed facts, and the present appeal presents but a single question of law, and that is as to the legal rate of compensation to which the railroad company is entitled for the transportation of property and troops of the United States over a continuous line of railroad, part of which is free-haul and the remaining part of which is pay line.

The Court of Claims made its findings of fact in the case, and rendered judgment dismissing the petition; and it is from that judgment that this appeal is taken (R., 6-10).

Assignments of Error.

1. In holding that a mileage proportion of a "through" rate, between given terminal points, is the proper basis of compensation to appellant company, for transportation and carriage by it of passengers and freight for the United States, where a part of the trip, between said points, was over a "pay line," and the remainder thereof was over a "free-haul" line.

2. In not holding that the proper basis of compensation in such case is the "local" rate over the "pay line," and nothing over the "free-haul" line.

3. In holding that appellant is not entitled to recover upon the basis of the "local" rate for the services rendered by it to the United States covering so much of the haul as was over the "pay" line.

4. In failing to enter judgment for appellant in the sum of \$23,980, being the difference between compensation computed on the basis of the "local" rate on the "pay" line, and the amount actually paid appellant, computed on the basis of a mileage proportion of the through rate covering the entire distance.

5. In dismissing the petition of appellant, and in entering judgment in favor of appellee (R., 13-14).

BRIEF.

The line from Roseville Junction to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed by the Central Pacific Railroad Company under the act of Congress approved July 1, 1862 (12 Stat., 489), section 6 of which act thus provided:

"SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company * * * shall at all times * * * transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service)."

The above provision is applicable to the transportation involved herein covering the haul from Roseville Junction south, and is the line referred to herein as "pay" line; in other words, that part of the continuous haul for which the carrier is entitled to receive "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" (*supra*).

The line from Roseville Junction to Portland, Oregon, was constructed under the act of Congress approved July 25, 1866 (14 Stat., 239), section 5 of which act thus provided:

"SEC. 5. *And be it further enacted*, * * * And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States: And the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States."

The provisions of that section are applicable to the transportation involved herein covering the haul from Roseville Junction *north*, and is the line referred to herein as "free-haul" line; in other words, that part of the continuous haul of property or troops of the United States required to be made and performed "at the cost, charge, and expense of the corporations or companies owning or operating the same" (*supra*).

The Southern Pacific Company, appellant herein, is the lessee of each and all of the lines above mentioned, and as such operated the same during all the times mentioned herein (R., 6).

From the above provisions of law, and as applied to the present case, the "pay" line either begins or ends at Roseville Junction, California, to or from, east or south, and the "free-haul" line begins or ends at Roseville Junction, from or to Portland, Oregon, on the north.

To illustrate the matter in its simplest form, take the case of a shipment or carriage between San Francisco, California (on the south), and Portland, Oregon (on the north), *via* Roseville Junction.

While there is a continuous rail line between those two points the line itself, from the standpoint of compensation or pay to the railroad company, *breaks* at Roseville Junction; *south* of that point it is "pay" line; *north* thereof, it is "free-haul" line; and it so happens that appellant company, as lessee, operates *both* lines.

And thus the question arises: Is appellant entitled to its full *local* rate between San Francisco and Roseville Junction, California (as claimed by it), or is it only entitled to the *mileage proportion* which the distance between those two points bears to the through haul and *through* rate, San Francisco, California, to Portland, Oregon (as insisted by the United States and as held by the Court of Claims herein)?

The distance between San Francisco and Roseville Junction, California, is 108.03 miles, and the published *local*

freight rate between those points is 26 cents per hundred weight, and \$3.05 for passenger fare.

The distance from Roseville Junction, California, to Portland, Oregon, is 633.91 miles, and, as already explained, that line is non-pay or "free-haul."

The published *through* rate, San Francisco to Portland, is 51 cents per hundred weight, and \$20 for passenger fare.

Now, instead of paying appellant company the local rates of 26 cents per hundred weight for transportation of property and \$3.05 for troops of the United States, between San Francisco and Roseville Junction, California (pay-line), the shipment or carriage being destined to Portland, Oregon, the United States allowed and paid only $108/772$ of 51 cents (*through* freight rate, San Francisco to Portland, *supra*), or, in round numbers, $7\frac{14}{100}$ cents per hundred weight for transportation of property, instead of 26 cents per hundred weight; and like proportion ($108/772$) of \$20 (*through* passenger rate between same points), or, in round numbers, \$2.80, instead of \$3.05 for passenger fare (R., 9).

The difference between the several amounts claimed by appellant company under the *local* rate on the "pay" line and the several amounts allowed and paid by the United States under the *mileage proportion* of the *through* rate, as above explained, is the amount involved in this suit, namely, the sum of \$23,980 (R., 9).

THE STATUTORY CONTRACT EFFECTED BY THE ACTS OF CONGRESS OF JULY 1, 1862, AND JULY 25, 1866, SUPRA.

Under the law, as already noted, the Government is entitled to "free-haul" for 634 miles of the above distance of 772 miles; that is, between Portland and Roseville Junction; but there the free-haul stops, and, at that point, the carrier, for the distance from Roseville Junction to San Francisco, 108 miles, becomes entitled to fair and reasonable rates of

compensation, not to exceed the amount paid by private parties for the same kind of service, and that amount, as already shown, is 26 cents per hundred pounds for the transportation of property and \$3.05 for troops of the United States.

The Government, however, insists that the proper charge is a *mileage proportion* of the amount which it would have had to pay for the entire through transportation, San Francisco to Portland, had it not been entitled to free-haul on a part of the journey.

Such contention, however, if sustained, would impose upon the carrier an additional burden not contemplated or authorized by Congress, since it would result in giving to the Government the free-haul from Portland to Roseville Junction, to which it is of right entitled, but would also give to it, at the cost and expense of the railroad carrier, more than two-thirds of its lawfully established compensation for the transportation of property over the line that is not free-haul (Roseville Junction to San Francisco); that is to say, out of a lawfully established rate of 26 cents per hundred pounds it proposes to pay, and actually has paid, claimant but 7.14 cents per hundred pounds, and \$2.80, instead of \$3.05, for passenger fare.

To further analyze the contention of the Government, suppose, for example, if such a thing were now legally permissible, that an individual had a "pass" for either his person or property, Roseville Junction to Portland, and wished to purchase from the carrier transportation that, plus the pass, would convey him or his property upon a continuous trip, San Francisco to Portland *via* Roseville Junction. Is it conceivable that he could demand of the carrier a *special rate* of but 108/772 of the "through" fare or rate, San Francisco to Portland, instead of paying the straight "local" fare or rate, San Francisco to Roseville Junction, at which last-named point his "pass"—namely, his "free-haul"—commences its operation? Surely not.

The fact that the trip is continuous or through, or in the same car or train, is really without legal significance in the case stated, or in the present, because the corporate service of transportation is a divisible one, since two totally distinct, different, and separate contracts enter into the service, one a continuing one, for all time, to "free-haul" between Portland and Roseville Junction, the other an executory contract for carriage between Roseville Junction and San Francisco at fair and reasonable rates of compensation.

With the latter contract the former has no concern; its interest begins and ends with free service between the points named; nor has the latter contract any interest in the former, save only that claimant, as lessee, is legally bound to accept the "free-haul" for whatever service it renders over that line. Beyond that patrons, private parties, and Government alike are bound to accept and pay the lawfully established rates.

There is a *statutory contract* under which appellant company is required to "free-haul" Government passengers and freight between Portland and Roseville Junction, and there is another entirely separate and distinct *statutory contract*, under which the Government is required to pay appellant company fair and reasonable rates of compensation for the haul between Roseville Junction and San Francisco not to exceed the amount paid by private parties for like service.

The Government, however, now seeks to justify, as compensation for this last haul, an amount considerably less than the sum that is paid by private parties for the same service, thus in necessary result imposing upon the carrier an *additional burden* neither warranted nor authorized by law.

As to the distance embraced in the "free-haul," the Government possesses and enjoys an exclusive privilege not permitted to private parties; but as to the distance not embraced in the "free-haul" line the Government stands under the law on precisely the same footing as an individual or private party.

The contention herein of the carrier is that the position assumed by the Government is one that would enable it, on the one hand, to appropriate to itself additional privileges and benefits neither intended nor authorized by the certain statutory contract effected by the act of Congress of July 25, 1866, *supra*, and, on the other hand, deprive the carrier of the privileges and benefits secured to it by the certain act of Congress of July 1, 1862, *supra*. This, it is submitted, cannot lawfully be done; and it matters not that the carrier happens to be operating both of the railroad lines that form the subject-matter of the two certain acts of Congress mentioned. That is a mere coincidence that should not be permitted either to enlarge or diminish the rights of the Government and carrier, respectively, so defined by those acts.

In this connection the case of *The Western Maryland Railroad Co. vs. Lynch* (82 Md., 233) is instructive: there Lynch and the railroad company in 1871 entered into a written contract, by the terms of which Lynch agreed to permit the railroad company to pipe water across his lands to a tank on the edge of the railroad tracks near the city of Westminster, Maryland; also to go upon his lands to make necessary repairs to the pipe line; and the railroad company covenanted that Lynch, his heirs and assigns, should be entitled forever thereafter to ride *without charge* upon the trains of the company and of its successors and assigns, only one such person, however, to be permitted so to ride free of charge, the company agreeing to issue passes from time to time to evidence the right of such free use of its trains.

At the time that contract was made the railroad company, under its charter, was only authorized to construct and operate a railroad in the State of Maryland between Baltimore and Williamsport. Thereafter various extensions of its charter were granted, so that at the time of the controversy in that case (1888), seventeen years after the contract was entered into, the Western Maryland Railroad Company, either as owner or lessee, operated its trains through the

State of Maryland to divers points in the State of Pennsylvania, and it was accordingly contended by Lynch that the above contract entitled him to a free pass over *the entire line of railroad as so extended*. The court, however, rejected the claim, stating:

“When a contract is made about an interest distinctly and specifically identified, it would require very extraordinary circumstances to justify a construction which should apply it to another and different object. Whatever may possibly arise in the infinite variety and complexity of human affairs, it is very safe to say that nothing of this kind exists in the present case. It is nothing to the purpose that the railroad has acquired the corporate capacity to have more extended tracks than it had at the time of the contract. The contract was for what it could then give; and not for what it might in the future acquire the power to give. Suppose in the course of events it should extend its tracks to California, would it be argued that it was bound to furnish to Lynch transportation the whole distance?”

It was contended below on behalf of the Government, and doubtless the same contention will be repeated in this court, that there is a lawfully established through rate from San Francisco to Portland, and that the Government is entitled to the benefit of the through rate, where such rate exists, just as would be the case as to a private shipper between the terminal points named, and that the Government really stands in the position of a private shipper who has paid his freight charges *in advance* as to a portion of the journey; meaning thereby the grant of lands contained in said act of July 25, 1868, *supra*.

In reply to that contention, it may be said, in the first place, that it is not accurate to ascribe to the Government the position of one who has prepaid its freight charges for all time by means of a land grant. The land grant was an element in the statutory agreement between Congress and

the grantee railroad company, and doubtless in part a consideration for the promised free-haul, for all time, of property and troops of the United States, but it is a matter of public history as well as common knowledge that the Government itself received a very substantial consideration for the land grants made by it, in the opening, settlement, and development of the vacant public lands of the United States brought about by railroad construction and operation. That undoubtedly was a prime factor in the endeavor of the Government to induce persons or corporations to undertake the vast project of railroad construction across the then undeveloped and unsettled public domain. To encourage and induce parties to undertake this vast work, Congress offered land grants, from the proceeds of which, it was assumed, that financial assistance would result to aid in the railroad construction. Furthermore, the Government reserved to itself the intervening even-numbered sections, and the value of those reserved sections was, naturally, very greatly enhanced by the railroad construction.

While, as to the Roseville Junction-Portland line, the railroad was made to be a public highway for the use of the Government, free of all toll or other charges upon the transportation of the property or troops of the United States, it would be exceedingly difficult, if not practically impossible, to figure these land grants as a *prepayment*, for all time, for the transportation of Government property and troops, as so contended below on behalf of the United States.

Thus, suppose the grant to have been one of a million acres, and giving to the granted land a value of \$1.25 per acre, such contention of the Government would start with an assumed *prepayment* by it of one and a quarter million dollars. The initial shipment of Government freight would reduce the assumed prepayment account, and as the railroad line has been in operation for some thirty years or more, it is quite evident that the assumed prepayment account may already very readily be assumed to have become more than exhausted.

It would seem practically impossible to dispose of this case under the theory of a prepayment of freight charges by means of a land grant, even were the application of such theory possible, but which, it is submitted, it is not; and, furthermore, the application of any such theory is not legally permissible, and this for the reason that tariff rates are based upon a *money* charge; and free passes in settlement of damage claims, newspaper advertisements, or in payment of railroad rights of way, etc., find no place in the tariffs authorized and required by law.

Thus, in the case of Louisville & Nashville R. R. Co. *vs.* Mottley (219 U. S., 467, 476-7), the railroad company, in 1871, had compromised a damage claim for personal injuries received by Mottley and his wife in a railroad collision by agreeing to give to each of them a free pass annually for their respective lives. The railroad company kept and performed the agreement during the years until the passage by Congress of the act of June 29, 1906 (amendatory of the Act to Regulate Commerce, approved February 4, 1887), which made such free passes illegal. Thereupon, Mottley and wife brought suit against the railroad company to specifically execute the agreement, by issuing passes to plaintiffs for the year 1909, and for every year thereafter, so long as they should live.

In the opinion of this court in that case the following is stated:

"In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates

were as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedule and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.

"That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its conference rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co. vs. Goodridge*, 149 U. S., 690, 691; *Gulf, Col., &c., Ry. Co. vs. Hefley*, 158 U. S., 98, 102; *I. C. C. vs. Ches. & Ohio Ry. Co.*, 200 U. S., 361, 391; *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 423, 439. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation

ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs."

It would seem that the exact point involved in the instant case has never been directly passed upon by the Interstate Commerce Commission, although the following appears to support the theory contended for by appellant.

In conference ruling of the Commission, No. 224, adopted May 12, 1908, the rule was announced:

"Transportation of Trucks or Cars Destroyed on Foreign Lines.—If a car of one company is destroyed on the line of another company, and the lines of those two companies directly connect with each other, the carrier upon whose line the car is destroyed may transport free, as its own property, to junction with the line of the carrier owning the car, the trucks of the destroyed car, which are understood to be salvage from a wreck, the cost of which must be borne by the carrier on whose line it occurs. If there is not a direct connection between the line of the carrier owning the car and the line upon which it is destroyed, the carrier on whose line the car is destroyed may transport the trucks free to a junction with an intermediate carrier, and pay to the intermediate carrier or carriers their *full tariff rates* for transporting them to a junction with the line of the carrier owner of the car destroyed, and such owner may transport them on its own line as its own property." (Italics by counsel.)

That ruling would seem to establish the proposition that if the line, say, from San Francisco to Roseville Junction, were operated by a different company from that operating the free-haul line from Roseville Junction to Portland, and if joint through rates were in effect over both lines through from San Francisco to Portland, the company operating between San Francisco to Roseville Junction could not charge on a *private shipment*, from San Francisco to Rose-

ville Junction, its proportion only of the joint through rate to Portland, unless the line north of Roseville Junction also received its full proportion of the joint through rate, but must charge its full local rate for the haul from San Francisco to Roseville Junction—in other words, the integrity of the joint through rate would be destroyed if the carrier north of Roseville Junction received any more or less than its correct proportion thereof; and the other carrier becomes immediately entitled to a charge as if no joint through rate existed.

Again, in the case *In re Beekman Lumber Co. vs. St. Louis & San Francisco Railroad Co. et al.* (21 I. C. C. Rep., 207), the decision was thus stated in the syllabus:

"1. Carriers, buying what will ultimately become company material, contract with shippers located off their lines and agree that if the vendor will bill the shipment beyond a designated junction point, where their own lines and the lines of the initial carrier meet, that, of the joint through rate, the purchasing carrier will absorb its own division, the shipper assuming only that portion of the joint through rate which accrues to the initial carriers as their division of the rate up to the junction point designated in the billing. *This practice results in the application of a portion of a joint rate from the point of origin to point of destination, to wit, that portion from point of origin to the junction point, for the use of a particular shipper, which is not published for the benefit of the public at large, nor filed with the Interstate Commerce Commission, under section 6 of the act. Contracts providing for such rates held to be in violation of law. Practice condemned and complaint dismissed.*" (Italics by counsel.)

In this connection it may be suggested that, as to transportation that may be performed jointly by two carriers, there can be no difference whatever whether the transportation be for the Government, or for a private individual, since the only basis upon which such differentiation might be asserted would be on the ground of a contract between one of

the carrying lines and the Government; which, however, would then be a contract as to which the other carriers would have no part or obligation, and, of course, one not contemplated when through joint rates are agreed upon and established between carriers. And thus it must result that, in the matter of joint through rates, the Government stands in exactly the position of a private shipper, unless all carriers under the through rate make an express exception in its favor.

The foregoing would seem to establish that if the transportation had been performed on the two lines, San Francisco to Roseville Junction and from Roseville Junction to Portland, prior to both of the lines coming under the control of a single company, the Government would not have been entitled to demand any less rate of charge from San Francisco to Roseville Junction than the "local" rate.

If the Government's contention be carried out to its last analysis, it would be quite impossible for appellant ever to charge it the fair and reasonable rate of compensation which it lawfully charges private parties for the haul between Roseville Junction and Ogden or San Francisco—in other words, the full "local" rate—even if the Government shipment originated at Roseville Junction and was destined to either of the points mentioned, or to any other points south of Roseville Junction, since it would be possible, under such asserted theory, to demand such carriage at the mileage proportion of a "through" haul from Portland to the point of destination south of Roseville Junction; and, if the carrier refused, it could require the latter to "free-haul" the shipment from Roseville Junction to Portland (although really destined not there, but to a point south of Roseville Junction), and then to immediately return the shipment as a "through" haul from Portland to the point south of Roseville Junction, and then demand of the carrier the mileage proportion rate of the "through" haul.

Such a situation was certainly never contemplated by either of the parties, Government and carrier, to the statutory

contract of July 25, 1866, whereby the Government was accorded the right of free-haul for its troops and property between Roseville Junction and Portland.

By the foregoing illustration, it is, of course, not meant to even suggest that the Government would undertake to deprive the carrier of its lawful measure of compensation by a procedure of that kind, but the illustration is given as a *test* of the theory itself, and if the position asserted will not bear the test of the illustration, it would seem to follow that the position itself is equally untenable.

Finally, the Court of Claims, in its opinion herein below, stated that the method adopted by the accounting officers of the Government in the settlement of this case has been uniform and long continued, citing 8 Comp. Dec., 598 (R., 12).

The decision just cited, however, gave rise to the present suit, which is in the nature of an appeal therefrom to the courts. The few decisions of the Comptroller in which the question arose prior to that mentioned are really not particularly instructive, as they do not present the issue that is involved in this case, since there were some rates to divide, for example, a 50 cent land-grant rate, etc. Here a division of a through rate is impossible, since part of the haul was absolutely "free," and hence there is nothing to divide.

Since this case has been pending in court, and since his said decision in 8 Comp. Dec., 598, *supra*, the Comptroller has naturally adhered to his former ruling, and it may be assumed that he will continue to do so, unless and until this case shall be decided adversely to his said ruling.

Without further prolonging the argument, it is respectfully submitted that the judgment below is erroneous and should be reversed.

Respectfully,

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Attorney for Appellant.

WASHINGTON, D. C., December 16, 1914.